Nos. 13-354 & 13-356

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICAN BIBLE SOCIETY, ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ASSOCIATION OF GOSPEL RESCUE MISSIONS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE LUTHERAN CHURCH – MISSOURI SYNOD, PRISON FELLOWSHIP MINISTRIES, AND WORLD VISION, INC. AS AMICI CURIAE SUPPORTING HOBBY LOBBY AND CONESTOGA WOOD, ET AL.

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QUESTION PRESENTED

This brief addresses the question whether the public meaning of the Religious Freedom Restoration Act covers for-profit corporations and their owners.

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INTEREST OF AMICI CURIAE[1]

Amici are religious and civil liberties organizations who are concerned that the Religious Freedom Restoration Act be accurately interpreted and fully enforced. Several of these amici actively participated in the effort to pass RFRA and related legislation and in the debates reviewed in this brief. Individual amici are described in the Appendix.

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act provides universal coverage. It applies to "all" federal law and to "all" cases where the free exercise of religion is substantially burdened.

The legislative history confirms the universality of the statutory text. The sponsors resisted all efforts to add exceptions to coverage. A definition in an early version of the bill, limiting coverage to "natural persons" and religious organizations, was eliminated in all later drafts.

After this Court invalidated RFRA as applied to the states, Congress sought to re-enact RFRA's

[1] No counsel for a party authored any part of this brief. No person, other than amici curiae, their members, and their counsel, made a monetary contribution to fund the preparation or submission of this brief. Written consents of all parties to the filing of this brief are on file with the Clerk or accompany this brief.

standard, in substantively identical language, for application to cases that could be reached under the Commerce and Spending Clauses. The debates on this bill, the Religious Liberty Protection Act (RLPA), reveal the public meaning of the nearly identical language in RFRA. The RLPA debate is highly probative because it was a serious fight on a live issue. It was not in any sense an attempt to make post-enactment legislative history about RFRA, but it clearly demonstrates the public meaning of RFRA's language.

RLPA was delayed for more than a year by demands for a civil-rights exception. This debate culminated in the Nadler Amendment, which would have prevented all but the very smallest businesses from invoking RLPA in response to civil-rights claims. In the debate on the Nadler Amendment, both sides agreed that the language copied from RFRA protected corporations. One side thought that desirable; the other side thought it desirable in some cases but objectionable in civil-rights cases. But there was no disagreement on what the language of RFRA and RLPA meant. The debate, conducted by the leaders on both sides, was extensive and unambiguous.

RLPA was never enacted, but neither was RFRA's coverage reduced. In the wake of this debate, Congress amended the relevant language of RFRA to further strengthen its protections.

The claims in these cases are clearly covered by the public meaning revealed in RFRA's text and

history and more specifically in the RLPA debates. Apart from civil-rights claims, both sides recognized the need to cover incorporated religious businesses (Mardel) and corporations with religious owners where regulation of the corporation would substantially burden the owners' exercise of religion (Hobby Lobby and Conestoga Wood).

The RLPA debate also confirms that RFRA applies to suits by private plaintiffs. The whole debate was about religious defenses to claims by individuals alleging discrimination.

Protecting for-profit corporations is consistent with larger traditions of religious liberty. State and federal conscience legislation has often protected for-profit businesses. The most relevant example here is the widely enacted conscience legislation with respect to abortion.

The plaintiffs in these cases object only to drugs and devices believed to sometimes cause abortions. And the protection for conscientious refusals to kill is especially well settled in our tradition.

Our moral tradition holds corporate owners and leaders morally responsible for the wrongdoing of their corporations. The government often imposes criminal responsibility on individuals for corporate wrongdoing. That it has not done so in the Affordable Care Act does not change the basic point; it is entirely normative for the individual plaintiffs to feel morally responsible for the acts of the corporations they control.

Finally, excluding religious minorities from significant businesses or occupations is a time-honored means of religious persecution, well known to the Founders. If the individual plaintiffs refuse to violate their conscience, the government would exclude them from any business that grows to fifty employees and to incorporated status. Such exclusions must be covered by the Free Exercise Clause, and when accomplished by allegedly neutral and generally applicable laws, covered by RFRA.

ARGUMENT

I. Congress Explicitly Understood RFRA to Protect For-Profit Corporations and Their Owners.

The government argues that incorporated for-profit businesses, and the owners of such businesses with respect to any claim arising in the course of operating the business, are categorically excluded from the protections of the Religious Freedom Restoration Act. Pet. Br. 15-31, No. 13-354.

This view is demonstrably mistaken. It is inconsistent with the statutory text. It is inconsistent with the drafting history. And it is inconsistent with a substantial and hard-fought debate over legislation *in pari materia* with RFRA and worded identically with RFRA in every relevant respect.

A. The Text and History of RFRA Show That All Claims Are Covered, Including Claims by For-Profit Corporations.

1. The Statutory Text Provides Universal Coverage.

Congress repeatedly emphasized that RFRA would provide universal coverage, applying a single standard to all cases. Excluding corporate cases at the threshold, instead of evaluating them under RFRA's substantive standard of exercise of religion, substantial burden, compelling interest, and least-restrictive means, is inconsistent with this commitment to uniform coverage of all claims.

RFRA explicitly "applies to *all* Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. 2000bb-3(a) (emphasis added).[2] RFRA's stated purpose is "to restore the compelling interest test . . . and to guarantee its application in *all* cases where free exercise of religion is substantially burdened." §2000bb(b)(1) (emphasis added). RFRA protects "*a person's* exercise of religion" – not a natural person's, or a not-for-profit person's. §2000bb-1(a) (emphasis added). And of course "person" in federal legislation includes natural persons

[2] This section originally said that RFRA "applies to all Federal and State law." Pub. L. 103-141, §6(a), 107 Stat. 1488, 1489 (1993). The words "and State" were deleted by the Religious Land Use and Institutionalized Persons Act, Pub. L. 106-274, §7(b), 114 Stat. 803, 806 (2000).

and every form of artificial person, including for-profit corporations, unless the context indicates otherwise. 1 U.S.C. 1. The universality of persons covered and the universality of government actions covered are of a piece: Congress enacted a single standard and applied it universally.

2. The Legislative History Confirms the Statutory Text.

This universal coverage was further emphasized in the committee reports. The House Report said that RFRA would apply to "[*a*]*ll* governmental actions which have a substantial external impact on the practice of religion," that "the definition of governmental activity covered by the bill is meant to be *all inclusive*," and that RFRA's "test applies *whenever* a law . . . burdens a person's exercise of religion." H.R. Rep. 103-88, at 6 (1993) (emphasis added). The test applies to "*all* cases." *Id.* at 7 (emphasis added). The Senate Report said that the bill was needed to "assure that *all* Americans are free to follow their faiths free from governmental interference." S. Rep. 103-111, at 8 (emphasis added).

This emphasis on universal coverage was not just political rhetoric. The bill was supported by Democrats and Republicans, liberals and conservatives,

secular groups and religious groups.[3] Universal coverage by a single standard was a key to holding this broad coalition together: no one could have an exception for his favorite cause, because that would lead other groups to ask for other exceptions. Many groups requested many different exceptions; the sponsors repeatedly said no. Had exceptions proliferated, the bill would have become a list of approved and disapproved religious-liberty claims. As the original lead sponsor in the House testified:

> If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed [sic] in codifying rather than reversing *Smith*.[4]

Congress of course recognized that judges would and should consider the facts and context of individual cases, but the Act "would establish one standard for testing claims of Government infringement on religious practices." S. Rep. at 9. That "one standard"

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[3] See, e.g., 139 Cong. Rec. 26,190 (Oct. 26, 1993) (Sen. Hatch) (listing 27 organizations and stating that there were 40 more in the Coalition for the Free Exercise of Religion).

[4] *Religious Freedom Restoration Act of 1991:* Hearings on H.R. 2797 Before the Subcommittee on Civil & Constitutional Rights of the House Committee on the Judiciary 124 (1992) (Mr. Solarz). Sponsors are listed on bills as originally introduced. See H.R. 5377, 101st Cong., and H.R. 2797, 102d Cong.

would apply to prisoner cases, *id.*; a floor amendment to exclude prisoner claims was rejected in the Senate, 58-41.[5] "[T]he unitary standard set forth in the act" would apply to military cases. *Id.* at 12. A competing bill, which was not enacted, would have excluded all abortion claims. H.R. 4040, 102d Cong. It was principally the fight over an abortion exception that held the bill up for three years. See, e.g., the two-day hearing cited in note 4, which was dominated by the abortion issue. The sponsors held firm to their commitment to no exceptions.

Had anyone demanded an exception for claims by for-profit corporations or their owners, the response would have been the same. We know this with unusual clarity, for two reasons, each explained below. First, an early draft did exclude corporate claims; that provision was deleted. Second, in the next round of legislation on the subject, powerful forces sought to exclude some corporations with respect to some kinds of claims. The sponsors again said no. RFRA enacted a single standard for all cases, and there were no exceptions.

3. Congress Eliminated a Definition That Would Have Codified the Government's Interpretation.

RFRA was first introduced in the 101st Congress as H.R. 5377 and S. 3254. Each bill contained a

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[5] 139 Cong. Rec. 26,407-14 (Oct. 27, 1993).

definition of "person," "[a]s used in this Act." These definitions were omitted when the bills were introduced in the 102d Congress as H.R. 2797 and S. 2969, and again when the bills were introduced in the 103d Congress as H.R. 1308 and S. 578. When the drafters delete a definition of a term that is also defined in the Dictionary Act, the natural inference is that they chose to rely on the Dictionary Act instead of creating a more specific definition for a particular statute. But there is more.

Section 4(4) of H.R. 5377 would have explicitly stated the government's view of this case: "the term 'person' includes both natural persons and religious organizations, associations, or corporations." That provision, with its reference to natural persons, was omitted from later drafts and from the bill as enacted.[6]

The limited definition in H.R. 5377 was inconsistent with the commitment to universal coverage in later versions of the bill. It may also be that the lead sponsor, who represented "the largest Orthodox Jewish community in the entire country,"[7] realized

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[6] The definition in S. 3254 was slightly different: "[T]he term 'person' includes natural persons, religious organizations, associations, and corporations." Because there is no "and" after "persons," to make a separate series of what follows, "religious" modifies only "organizations." All corporations are literally included. But this was probably an attempt to duplicate the definition in the House bill. Either way, this definition and its reference to "natural persons" were dropped from later bills.

[7] House Hearing, *supra* note 4, at 119 (Mr. Solarz).

that Orthodox businesses needed the bill's protections. The statutory text, the legislative history, the refusal to create any exceptions, and the elimination of this narrow definition of "person" all point in the same direction. RFRA protects all persons, including for-profit corporations and their owners. The statutory text repeatedly says "all," because that is what Congress meant.

B. The RLPA Debates Confirmed the Understanding That RFRA Applies to For-Profit Corporations and Their Owners.

1. The RLPA Debates Are Relevant to Show the Public Meaning of RFRA.

As enacted in 1993, RFRA applied to "all Federal and State law, and the implementation of that law." See *supra* note 2. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held RFRA unconstitutional as applied to the states.

Congress attempted to respond with the proposed Religious Liberty Protection Act (RLPA).[8] RFRA's

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[8] This bill was H.R. 4019 and S. 2148 in the 105th Congress and H.R. 1691 and S. 2081 in the 106th Congress. These bills sometimes mysteriously fail to appear in searches on Thomas, but they are available from other official sources. H.R. 1691, which generated the debate and vote discussed in this brief, is available at http://beta.congress.gov/106/bills/hr1691/BILLS-106hr1691ih.pdf and at http://www.gpo.gov/fdsys/pkg/BILLS-106hr1691eh/pdf/BILLS-106hr1691eh.pdf.

substantive standard – the language that either does or does not include for-profit corporations – is found in Section 2 of the original RFRA bills, now 42 U.S.C. 2000bb-1.[9] Section 2 of RLPA tracked this language verbatim, except for stylistic tweaks that could not possibly affect meaning, and would have applied this language to the states in all cases that Congress could reach under the Commerce Clause or the Spending Clause.[10] When Congress discussed the

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[9] RFRA provided, and still provides:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1.

[10] RLPA would have provided:

(a) GENERAL RULE. – Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise [in Commerce or Spending Clause cases] even if the burden results from a rule of general applicability.

(b) EXCEPTION. – A government may substantially burden a person's religious exercise if the government

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meaning of Section 2 of RLPA, it was necessarily also discussing the meaning of Section 2 of RFRA. Everyone agreed on what this section of RLPA meant – and therefore on what RFRA meant.

RLPA was not enacted in its original form, but parts of it were enacted in the Religious Land Use and Institutionalized Persons Act, including amendments to strengthen RFRA. We will return to these amendments after reviewing the debate.

This debate is not "post-enactment legislative history" of RFRA. Nobody on either side offered to explain RFRA for the record. Rather, this was a hard-fought debate about whether to amend a pending bill that was not just *in pari materia* with RFRA, but on the issues presented here, substantively identical to RFRA. Everyone agreed on the meaning of the unamended language and on the meaning of a proposed amendment. The leaders on both sides of this debate were consulting the interest groups who cared about the bill. This is not a case where the interest groups

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demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

H.R. 1691 §2 (106th Cong.). The committee report said, with the slightest of imprecision, that "Section 2(b) is taken verbatim from RFRA." H.R. Rep. 106-219, at 28 (1999).

on one side got to draft the committee report; the two sides agreed on what the bill meant. This debate shows the public meaning of RFRA's text as of 1999.

This debate is not at all like the post-enactment history rejected in *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011). That "history" was an explicit and self-conscious attempt to explain the meaning of a prior law; this was not. In the RLPA debates, Congress discussed the public meaning of an existing statute for the purpose of further legislation. Moreover, application of the history offered in *Bruesewitz* to the issue in the case depended on attenuated inferences; here, the leaders for the two sides squarely addressed the central issue now presented in this case.

The RLPA debates are like the evidence of what the Second Amendment was understood to mean, which the Court considered in *District of Columbia v. Heller*, 554 U.S. 570 (2008): "'[P]ostenactment legislative history' . . . most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification." *Id.* at 605 (original emphasis). The RLPA debates showed public understanding both because the interest groups were involved, and because the legislators involved were acting like readers of statutes. They were *not* attempting to explain in 1999 what they had been thinking in 1993. They were taking the statutory text at face value, and in light of RFRA's

no-exceptions principle, and attempting to legislate against that background.

The RLPA debates are also, for those who consider legislative history, pre-enactment history of the amendment strengthening Section 2 of RFRA.

2. RLPA Became Entangled in a Debate Over Its Effect on Civil-Rights Claims.

Between the enactment of RFRA in 1993, and the critical debate on RLPA in 1999, state and federal courts decided a series of cases in which religious landlords refused to rent to unmarried couples. The couples sued for marital-status discrimination. The cases went both ways,[11] but they suggested a potential

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[11] See *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (ruling for landlord on federal free-exercise grounds), *vacated on other grounds*, 220 F.3d 1134 (2000) (en banc); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998) (finding compelling interest and noting that landlords could get out of the rental business), *vacated in part*, 593 N.W.2d 545 (1999); *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996) (finding no substantial burden on religious exercise, because landlords could get out of the rental business); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994) (finding compelling interest in uniform enforcement of non-discrimination laws); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that government must show compelling interest to override landlords' state-law free-exercise rights); see also *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (interpreting state's ban on marital-status discrimination not to apply, and also relying on state constitution's free-exercise clause). The landlord-tenant cases

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for conflict between religious liberty and other civil rights and for religious-liberty claims by for-profit investors. This conflict quickly became a serious obstacle to the passage of RLPA. The House and Senate held a total of nine hearings in a futile effort to work out the disagreements.[12] (Hearings are cited hereafter by House or Senate and date.) The Court has recognized that these hearings on RLPA are part of the legislative history of RLUIPA, the bill that emerged from these debates. *Cutter v. Wilkinson*, 544 U.S. 709, 716 & n.5 (2005).

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are reviewed in the committee report on RLPA. H.R. Rep. 106-219, at 14.

[12] *Protecting Religious Freedom After Boerne v. Flores:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary (July 14, 1997); *Protecting Religious Freedom After Boerne v. Flores (Part II):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary (Feb. 26, 1998); *Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary (March 26, 1998); *Religious Liberty Protection Act of 1998:* Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 4019 (June 16 and July 14, 1998); *Religious Liberty Protection Act of 1999:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 (May 12, 1999); *Religious Liberty Protection Act of 1998:* Hearing Before the Senate Committee on the Judiciary on S. 2148 (June 23, 1998); *Religious Liberty:* Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure (June 23 and September 9, 1999).

In February 1998, the landlord in one of the marital status cases testified about RLPA before the House Subcommittee on the Constitution.[13] Americans United for Separation of Church and State responded, urging legislators to disavow any intention to "broadly protect religious claims against federal and state anti-discrimination laws."[14] The dispute escalated from there.

Mr. Scott, then the ranking Democrat on the subcommittee, said in his opening statement at the next hearing that the bill "will have to steer clear of any disruption of any Civil Rights laws."[15] (Committee and subcommittee members are listed in hearing records at p. ii). In this and later hearings, witnesses supporting the bill argued that there were many kinds of civil-rights claims, that religious conscientious objectors should and would lose most civil-rights cases but that they should win some, and that RFRA's general standard should be applied in this context as in all others.[16] They again invoked the no-exceptions

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[13] House Hearing 25-29 (Feb. 26, 1998) (Evelyn Smith).

[14] *Id.* at 69 (Barry Lynn, Americans United).

[15] House Hearing 2 (March 26, 1998).

[16] See, e.g., *id.* at 5, 13 (Marc Stern, American Jewish Congress); House Hearing 32 (June 16, 1998) (Prof. Thomas Berg, an advocate of religious-liberty legislation); *id.* at 56-57, 62-65 (Marc Stern); House Hearing 184-85 (July 14, 1998) (Steven McFarland, Christian Legal Society); *id.* at 236-38 (Prof. Douglas Laycock, an advocate of religious-liberty legislation); House Hearing 55, 58 (May 12, 1999) (Brent Walker, Baptist Joint Committee on Public Affairs); *id.* at 91-95 (Rabbi David

(Continued on following page)

principle, both on principle and to prevent the bill from unraveling amid multiple demands for special exceptions.[17] This testimony came in prepared statements and also in response to active questioning on the issue from committee members.

Opponents mostly worked behind the scenes until a landlord won a high-profile case in the Ninth Circuit early in 1999.[18] Then opponents appeared at hearings and testified that civil-rights claimants should not have to litigate an uncertain religious-liberty defense, that every civil-rights claim serves a compelling interest by the least-restrictive means, and that the bill should be rejected unless amended to exclude all civil-rights claims.[19]

Saperstein, Religious Action Center of Reform Judaism); *id.* at 103, 118-20 (Prof. Douglas Laycock); *id.* at 131-33 (Oliver Thomas, National Council of Churches); Senate Hearing 287-93 (June 23, 1998) (Marc Stern); Senate Hearing 12-14, 60-61 (June 23, 1999) (Steven McFarland); *id.* at 34, 36 (Elliot Mincberg, People for the American Way); *id.* at 59 (Michael Farris, Home School Legal Defense Association); Senate Hearing 76, 99-101, 148-49, 155-58 (Sept. 9, 1999) (Prof. Douglas Laycock); *id.* at 171 (Gene Schaerr, Religious Institutions Practice Group at Sidley & Austin); *id.* at 182 (Oliver Thomas).

[17] See, e.g., House Hearing 56 (June 16, 1998) (Marc Stern); House Hearing 92, 94-95 (May 12, 1999) (Rabbi David Saperstein); *id.* at 119-20, 129-30 (Prof. Douglas Laycock); Senate Hearing 5, 13-14, 61 (June 23, 1999) (Steven McFarland); Senate Hearing 100-01 (Sept. 9, 1999) (Prof. Douglas Laycock).

[18] *Thomas*, 165 F.3d 692 (Jan. 15, 1999).

[19] See, e.g., House Hearing 81-90, 122-24 (May 12, 1999) (Christopher Anders, American Civil Liberties Union); *id.* at

(Continued on following page)

The bill's lead sponsor in the House described the resulting fight this way: "I think what all of this is about, if we get right down to the facts of what is motivating this, was a 9th Circuit case in which a small religious landlord challenging a housing law was granted an exemption from compliance." 145 Cong. Rec. 16,236 (July 15, 1999) (Mr. Canady).

3. This Debate Confirmed That the Public Meaning of RFRA's Language Protects For-Profit Corporations and Their Owners.

The demand for a civil-rights exception culminated in the Nadler Amendment. We quote extensively from the debate on this amendment, to give the full views and context. These are not scattered quotations from possibly marginal legislators. These are the considered views of the leaders on both sides after grappling with the issue for seventeen months.

Mr. Nadler had been a lead sponsor of RFRA (H.R. 1308 in the 103d Congress) and initially, one of the two original bipartisan sponsors of RLPA (H.R. 4019 in the 105th Congress). He drafted his amendment "in consultation with both religious and civil

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96-100 (Prof. Chai Feldblum, an advocate of gay rights); Senate Hearing 41-51, 58 (June 23, 1999) (Christopher Anders); *id.* at 51-53, 57-58 (State Rep. Scott Hochburg [sic; should be Hochberg], who had sponsored the Texas RFRA); Senate Hearing 163-64 (Sept. 9, 1999) (Prof. Chai Feldblum); *id.* at 199-200 (letter from multiple civil-rights groups).

rights groups." H.R. Rep. 106-219, at 41 (dissenting views of Mr. Nadler and three others). He offered his amendment in the subcommittee and again in the full committee. *Ibid.* Committee discussion of his amendment occurred in markup sessions, which are not published. While he discussed his amendment with interest groups, *ibid.*, and probably shared the text with some of them, the text of his amendment became public only in the floor debate.

Mr. Nadler cast his amendment not as an exception for certain kinds of claims, but as a limitation on *who* could invoke RLPA in response to those claims. In his dissent from the committee report, he described his amendment in terms much like the government's argument in this case:

> [I]t sought to clarify that religious liberty is an individual right expressed by individuals and through religious associations, educational institutions and houses of worship. It would have made clear that the right to raise a claim under RLPA would have applied to that individual right, but that non-religious corporate entities could not seek refuge in a religious claim under RLPA to attack civil rights laws.

Ibid.

The committee majority referred only to an "issue," not to an amendment, and it affirmed its understanding that business corporations would be protected by the bill:

> One issue raised during the Subcommittee Markup was whether a business corporation could make a claim under H.R. 1691. The requirement of H.R. 1691 that the claimant demonstrate a substantial burden on religious exercise is equally applicable whether a claimant is a natural person or a corporation. Most corporations are not engaged in the exercise of religion, but religious believers, such as people in the Kosher slaughter business, *should not be precluded from bringing a claim under H.R. 1691 simply because they incorporated their activities pursuant to existing law.*

H.R. Rep. 106-219, at 13 n.49 (emphasis added).

It is true that most corporations are not engaged in the exercise of religion, but as the committee report recognized, it is equally true that some corporations, or their owners, *are* engaged in the exercise of religion. By allowing corporations to make a claim, the committee majority allowed for these cases.

The Nadler Amendment, as offered on the floor, was a limitation on the persons who could assert RLPA defenses to civil-rights claims. It would have excluded all but the tiniest corporations from invoking RLPA in such cases, by adding the following language to Section 4 of the bill:

> (e) PERSONS WHO MAY RAISE A CLAIM OR DEFENSE – A person who may raise a claim or defense under subsection (a) is –

(1) an owner of a dwelling described in section 803(b) of the Fair Housing Act (42 U.S.C. 3603(b)), with respect to a prohibition relating to discrimination in housing;

(2) with respect to a prohibition against discrimination in employment –

(A) a religious corporation, association, educational institution (as described in 42 U.S.C. 2000e-2(e)), or society, with respect to the employment of individuals who perform duties such as spreading or teaching faith, other instructional functions, performing or assisting in devotional services, or activities relating to the internal governance of such corporation, association, educational institution, or society in the carrying on of its activities; or

(B) an entity employing 5 or fewer individuals; or

(3) any other person, with respect to an assertion of any other claim or defense relating to a law other than a law –

(A) prohibiting discrimination in housing and employment, except as described in paragraphs (1) and (2); or

> (B) prohibiting discrimination in a public accommodation.

145 Cong. Rec. 16,233-34.

The housing exception in subsection (1) is limited to buildings with four or fewer units, one of which is occupied by the owner, and to certain private sales or rentals of single-family residences. 42 U.S.C. 3603(b). The statutory reference in subsection (2)(A) is to one of Title VII's exemptions for religious employers.

Supporters of the Nadler Amendment argued that without it, Section 2 of RLPA – the language copied from Section 2 of RFRA – would protect for-profit corporations. This was a recurring theme of the debate. Mr. Conyers, who was the ranking Democrat on the House Judiciary Committee and who managed the debate for supporters of the Nadler Amendment,[20] began by describing the landlord-tenant cases:

> "Now, none of these claims involve owner-occupied housing. All of the landlords owned many investment properties that were outside of the State laws [sic] exemptions for small landlords. These landlords are companies. And they all sought to turn the shield of religious exercise protection into a sword against civil rights prospective tenants." [quoting a letter from the ACLU].

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[20] 145 Cong. Rec. 16,223.

. . .

> So the bill is so sweeping that this new defense will not only apply to religious institutions themselves *but to companies and corporations as well.*

145 Cong. Rec. 16,220 (emphasis added). The government uses the same sword and shield metaphor here. Cert. Pet. 16.

Mr. Nadler agreed with Mr. Conyers:

> The bill as drafted would enable *the CEO of a large corporation* to say, "my religion prohibits me from letting my corporation hire a divorced person or a disabled person or a mother who should be at home with her children and not at work or a gay or lesbian person. And my religion prohibits me from letting my hotel rent a room to any such people. And never mind the State's civil rights laws that prohibit that kind of discrimination."

Id. at 16,225 (emphasis added).

Mr. Conyers spoke again:

> The right is so sweeping it will apply not only to religious institutions, *but to large corporations.*
>
> . . .
>
> This means that under the bill, businesses will be free to discriminate against gay and lesbian employees, and large landlords

> will be able to justify their refusal to rent to single parents or gays and lesbians.

Id. at 16,226 (emphasis added).

Mr. Frank, a member of the committee and subcommittee and an original sponsor of RFRA in the 101st Congress (H.R. 5377), made the same point. He noted that the recently enacted Texas RFRA had excluded all civil-rights claims,[21] but that the Nadler Amendment did not go so far: "I think that is a very reasonable accommodation the gentleman has offered. *He has said you do not give it to corporations*, et cetera." *Id.* at 16,229 (emphasis added).

Mr. Nadler resumed the floor, again previewing the arguments in this case:

> The amendment recognizes that religious rights are rights that belong to individuals and to religious assemblies and institutions. General Motors does not have sincerely held religious beliefs, by its nature. My amendment protects individual [sic] and religious institutions.
>
> In order to protect civil rights laws against the person who would say, "*My religion prohibits me from letting my corporation* hire a divorced person or a disabled person, . . . in order to protect civil rights laws against that sort of religious claim, *the*

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[21] Tex. Civ. Prac. & Remedies Code §110.011 (Vernon's 2011).

> *amendment places some limits on who may raise a claim* under this bill against the application of a State or local law.

Id. at 16,234-35 (emphasis added).

"Some limits." Without his amendment, Mr. Nadler plainly understood that there were no limits on who could raise a claim or defense – that "person" had its full Dictionary Act meaning.

Mr. Nadler emphasized that his amendment merely created "narrow exceptions" to the parties who could invoke the Act. *Id.* at 16,235. Subject only to

> these exceptions, *businesses of any size could bring any free exercise claims.* This is important for the mom and pop store that has difficulties with Sunday closing laws, or with laws allowing malls requiring stores to remain open 7 days a week, as well as for large firms that, for example, produce kosher meat or other products.

Ibid. (emphasis added). And this statement described what the law would be if his amendment were *adopted.* "Businesses of any size" could still bring RLPA claims, except in discrimination cases. The claims in *Hobby Lobby* and *Conestoga Wood*, seeking exemption from regulations under the Affordable Care Act, could still have been brought *even if the Nadler Amendment had been added to RFRA.*

Those who opposed the Nadler Amendment agreed that businesses and corporations could assert claims and defenses under the bill as drafted. They

had explicitly affirmed that proposition in the committee report. H.R. Rep. 106-219, at 13 n.49, quoted *supra* 20. They stuck to their position that these claims should be evaluated under the same standard as all other claims. And they emphasized that the language of the bill had already been approved in RFRA. Mr. Canady, Chairman of the Subcommittee on the Constitution and the bill's lead sponsor, who managed the floor debate for the bill's supporters,[22] summed up:

> *Like the Religious Freedom Restoration Act*, the Religious Liberty Protection Act is intended to provide a uniform standard of review for religious liberty claims. H.R. 1961 [sic] employs the "compelling interest/least restrictive means" test for all Americans who seek relief from substantial burdens on their religious exercise.
>
> Under the amendment offered by the gentleman from New York, only a preferred category of plaintiffs are granted this protection. The gentleman can describe it as a "carve in" or a "carve out," but the fact is *some people are not going to get the protection that the bill would otherwise afford them.*

145 Cong. Rec. 16,235 (emphasis added).

Mr. Canady denied that General Motors would have a claim, but *not* because General Motors was not

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[22] 145 Cong. Rec. 16,223.

a "person" protected by the Act. Rather, General Motors would lose on the merits:

> The argument that General Motors would have such a claim ignores the requirement of the bill that a claimant prove that his religious liberty has been substantially burdened by the government.
>
> I do not think that General Motors or Exxon Corporation or any other such large corporation that the gentleman wants to bring forward could come within a mile of showing that anything that was done would substantially infringe on their religious beliefs. They do not have a religious belief. They do not have a religious practice. It is not in the nature of such large corporations to have such religious beliefs or practices.

Id. at 16,235-36.

Mr. Canady said that large corporations such as General Motors and Exxon did not have religious beliefs or practices, but he did not say that smaller corporations, or closely held corporations, or their owners, could not have religious beliefs and practices. Rather, he said that all claims should be evaluated under RLPA's general standard:

> H.R. 1691 will continue in this [RFRA's] tradition weighing and balancing competing interests based on real facts before the Court. Religious interests will not always prevail, nor will those of the government. But the Nadler amendment would determine in

> advance that the interest of the Government will always prevail in certain cases. This is not what this Congress intended when it passed RFRA unanimously here in the House and is not the type of law I believe the American citizens want their Congress to enact.

Id. at 16,236.

He reminded members that Congress had already approved the unamended language:

> [T]he groups that urge adoption of this amendment did not find similar fault with the Religious Freedom Restoration Act. And I know that is not something that the proponents of this amendment want to hear about. That was then and this is now. *But all the arguments related to civil rights that have been advanced today were equally applicable to the Religious Freedom Restoration Act.*

Ibid. (emphasis added). Nobody disputed that.

Mr. Frank said the unamended bill would protect the religious-liberty interests of stockholders and leave it to the courts to decide whether the government's interest was compelling. Speaking first of potential civil-rights claimants, he said:

> [I]f they are an unmarried couple seeking to live together, it will be up to the Federal Government to judge whether or not they can rent an apartment *from a corporation,*

> *the stockholders of which said it is their religious objection.*

Id. at 16,240 (emphasis added).

Mr. Conyers argued that even with the Nadler Amendment, the bill would still protect very small businesses, even in discrimination cases:

> My colleagues, as the bill presently stands, whenever a parties [sic] brings suit claiming discrimination, the defendant will be able to claim that this is inconsistent with their religious beliefs.
>
> We are creating a huge disparity here. The Nadler amendment responds to the problem, thank goodness, by specifying that the bill's protections only apply to individuals, religious institutions, and small businesses.

Id. at 16,241.

Ms. Jackson Lee, a member of the Judiciary Committee, also previewed the government's argument in these cases:

> The amendment, crafted in consultation with both religious and civil rights groups clarifies the fact that religious liberty is an individual right expressed by individuals and through religious associations, educational institutions and houses of worship. It also makes clear that the right to raise a claim under RLPA applies to that individual. A non-religious corporate entities [sic] could

> not use a RLPA for a claim or defense to attack civil rights laws.
>
> Individuals, under this amendment, could still raise a claim based on their sincerely held religious beliefs which are substantially burdened by the government, whether *in the conduct of their businesses* [or anywhere else].

Id. at 16,242 (emphasis added).

There were other statements to similar effect, but these quotations cover the essential arguments. Members on both sides believed that the bill as drafted protected everyone, including large corporations if they could show a religious practice that was substantially burdened. The language creating that protection was copied directly from Section 2 of RFRA. Supporters of the Nadler Amendment knew they needed an amendment to exclude corporate claims, and they knew that they had not gotten such an amendment to RFRA.

The Nadler Amendment would have left RFRA's language in place, and applicable to most claims, but it would have confined RLPA protection with respect to civil-rights claims to the very smallest businesses. There was no disagreement about what the bill meant or what the amendment meant; the disagreement was over whether to adopt the amendment.

Thus informed, the House rejected the Nadler Amendment on a roll-call vote, 234-190. *Id.* at 16,244.

It then passed the unamended bill, also on a roll-call vote, 306-118. *Id.* at 16,245.

4. The Ensuing Senate Debate Led to the Enactment of RLUIPA and the Strengthening of RFRA.

RLPA died without a recorded vote in the Senate, where the civil-rights objection could not be overcome and the sponsors still refused to make exceptions. But Senators Kennedy and Hatch created a new bill, S. 2869, from the parts of RLPA that had sufficient support. This bill became law as the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.*

Section 7 of RLUIPA amended RFRA in ways that both strengthened and reaffirmed it. First, Congress deleted all references to state law, making clear its commitment to keeping RFRA in effect as to federal law.[23] Second, Congress incorporated into RFRA the stronger, more protective, definition of "exercise of religion" drafted for RLPA and enacted in RLUIPA. That definition, responding to certain lower court cases, clarified that "any" exercise of religion is protected, "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A); 42 U.S.C. 2000bb-2(4). This definition further strengthened Section 2 of RFRA, the section that had

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[23] Sections 7(a)(1) and (2), 7(b), 114 Stat. 803, 806 (2000); 42 U.S.C. 2000bb-2(1) and (2), 2000bb-3(a).

caused all the trouble – the section that everyone agreed already protected for-profit corporations even before it was strengthened.

5. This Debate Shows the Meaning of RFRA.

Summing up: the relevant language of RLPA was substantively identical to the relevant language of RFRA. Both sides agreed that that language protected for-profit corporations and their owners. The public meaning of this language was not disputed. But the policy embodied in this meaning had become controversial as applied to civil-rights claims. Congress could not agree on whether to make that language, with that meaning, broadly applicable to the states.

But Congress did agree to keep that language in place as applied to the federal government, to reaffirm that application, and even to broaden its scope by emphasizing that the "exercise of religion" means "any" exercise of religion.

Even the supporters of the amendment sought to exclude corporate claims only with respect to civil-rights laws. Apart from civil-rights laws, both sides agreed that religious-liberty claims arising in for-profit businesses, including businesses conducted in corporate form, should be protected under the general standard that RLPA had copied from RFRA. This is a much clearer and far more specific demonstration of statutory meaning than anything offered by the

government. And it is entirely consistent with the emphasis on a single standard, universally applicable to all claims, in the statutory text and legislative history of RFRA.

The government says that if RFRA had been intended to apply to claims by for-profit corporations, "there would surely have been some express mention of that intent." Pet. Br. 21, No. 13-354. In fact there was ample discussion of a broadly shared understanding of that very point.

6. The Claims in These Cases Are Covered by RFRA as Both Sides Understood It.

Apart from their disagreement over civil-rights claims, both sides agreed that the language copied from RFRA did, and should, cover corporations engaged in intrinsically religious businesses, such as kosher slaughterhouses. See *supra* 20 (committee report); *id.* at 25 (Mr. Nadler). Mardel is engaged in such a business.

Both sides also agreed that the language copied from RFRA covered incorporated businesses with religious owners whose personal religious practices were burdened by regulation of their corporation. See *supra* 20 (committee report) (believers should not lose rights by incorporating); *id.* at 24-25 (Mr. Nadler) ("my corporation," "mom and pop stores"); *id.* at 28-29 (Mr. Frank) (stockholders). Mr. Nadler added that the CEO would be covered. *Id.* at 23. Apart from their

disagreement over civil-rights claims, both sides thought that this coverage was important to the bill.

Realistically, only closely held corporations could show a substantial burden on their owners' religious exercise. Large corporations with religiously diverse owners are covered "persons," but they could not show a substantial burden.

The Greens and the Hahns *can* show a substantial burden, and they are clearly protected under the public understanding reviewed here. There is no reasonable dispute that they have a sincere and deeply held religious objection to paying, through their corporations or otherwise, to provide drugs and devices that they believe may cause abortions. The government's argument that RFRA does not even apply is based entirely on the formalisms of incorporation. Congress rejected those formalisms. Hobby Lobby, Mardel, and Conestoga Wood are protected because their owners are protected.

C. This Debate Also Confirms That RFRA Applies to Suits by Private Plaintiffs.

This debate also refutes the government's suggestion that RFRA might not apply to suits between private parties. Pet. Br. 43-45, No. 13-354. The entire debate about a civil-rights exception and the Nadler Amendment was conducted on the basis of a shared public understanding that RFRA applied, and that the same language in RLPA would apply unless

amended, to suits by private plaintiffs alleging discrimination.

In addition, the language on which the government relies for this point ("obtain appropriate relief against a government") was included for reasons going to sovereign immunity. The drafting history of RFRA is very clear that this language was never intended to preclude a RFRA defense in suits by private plaintiffs. See Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343, 348-55 (2013).

II. Protecting For-Profit Corporations Is Consistent with Larger Traditions of Religious Liberty.

A. Congress and the States Have Often Protected Conscientious Objectors Operating For Profit.

The government cites one of the Title VII exemptions for religious employers as illustrating a tradition of statutory protection confined to not-for-profit religious corporations. Pet. Br. 20, No. 13-354, citing 42 U.S.C. 2000e-1(a). This and similar statutes are not in point here; they provide a very different kind of exemption.

The Title VII exemption protects the autonomy of religious organizations. It permits religious organizations to prefer fellow believers with respect to any employee hired "to perform work connected with the

carrying on by such corporation, association, educational institution, or society of its activities." *Ibid.* The exception applies even if an employee's duties are not "'even tangentially related to any conceivable religious belief or ritual.'" *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 332 (1987) (quoting the district court in that case). The exemption does not require proof of a substantial burden on religious exercise. It does not require proof that hiring nonbelievers would be a violation of conscience.

Far more relevant here are the state and federal conscience statutes protecting medical providers from performing or assisting abortions. These provisions do protect conscience, and they protect every "individual or entity," 42 U.S.C. 300a-7, or "any health care entity," 42 U.S.C. 238n. Nearly every state has similar legislation.[24] These statutes protect doctors operating for profit, even if they incorporated their medical practice, and they protect incorporated for-profit hospitals. These statutes reflect a judgment by American legislatures that conscientious objectors to abortion should not be required to participate in one.

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[24] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same-Sex Marriage and Religious Liberty* 77, 299-310 (Douglas Laycock *et al.* eds. 2008) (appendix collecting these statutes as of 2008).

B. The Tradition of Protecting Conscientious Objectors Is Especially Broad and Deep with Respect to Taking Human Life.

These abortion-conscience statutes are especially relevant here because the plaintiffs in these two cases object *only* to drugs and devices believed to sometimes cause abortions. Just as a for-profit hospital cannot be required to passively allow its facilities to be used to perform an abortion, 42 U.S.C. 300a-7(b)(2), so a for-profit employer should not be required to actively pay for what its owners believe to be abortions.

More generally, conscientious scruples against taking human life have gotten the highest protection throughout our history. American exemptions from military service date at least to 1673.[25] This Court stretched the statutory exemption to military service to protect conscientious objectors who were not religious in any traditional sense. *Welsh v. United States*, 398 U.S. 333 (1970). All the abortion-conscience

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[25] Act of Aug. 13, 1673, in 2 *Records of the Colony of Rhode Island and Providence Plantations in New England* 488, 498 (John Russell Bartlett ed., Providence, Crawford Green & Bro., 1857). For this and other early conscientious objection legislation, see Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1803-25 (2006).

statutes appear to protect secular as well as religious conscientious objectors.[26]

The two states with legislation authorizing assisted suicide provide that no health-care provider can be required to participate or to allow the suicide to occur on its premises. Or. Rev. Stat. 127.885(4), (5)(a) (West Supp. 2013); Wash. Rev. Code 70.245.190(1)(d), (2)(a) (2012). These provisions plainly protect for-profit physicians, hospitals, nursing homes, and hospices.

It appears that no one has ever been required to participate in executions, and Congress and eleven of the capital-punishment states have now enacted express conscience protections. See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 137-38 (2012).

The RLPA debates make clear that for-profit corporations and their owners are protected by RFRA. But any residual doubts should be resolved in favor of protection in this context, where the plaintiffs are being asked to pay for what they believe to be the killing of an innocent human being. The government does not think that that is what it is asking, but there is no dispute that the plaintiffs sincerely understand it in just that way.

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[26] See Wilson, *supra* note 24.

The government's argument has no limits. If the Greens and the Hahns forfeited their rights to religious liberty when they incorporated their businesses – and that is the government's position with respect to any regulation of the corporations – then it would not matter if the government required coverage for all abortions, by any method, in any trimester. It would not matter if the government required coverage for partial-birth abortions, or assisted suicides, or unconsented euthanasia. The government's argument cuts off all claims at the threshold, without regard to the weight of competing interests. Congress more wisely provided that all claims should be assessed under RFRA's uniform statutory standard.

The government's position appears to be that once they incorporate, the Greens and the Hahns have no religious rights that a government is bound to respect. The corporation can be required to do absolutely anything, and the individual owners who carry out the corporation's work have no religious-liberty right to complain.

This level of formalism is not our tradition with respect to the moral responsibility of corporate owners and managers. If Mardel sold child pornography instead of Christian books, the government would not allow the Greens, actively involved as shareholders, directors, officers, and managers, to defend on the ground that "It wasn't me; the corporation did it." See *Alexander v. United States*, 509 U.S. 544 (1993). Alexander was convicted of obscenity and RICO offenses because corporations he owned sold obscene

films. The government can, and in some contexts does, impose criminal liability on corporate officers who failed to prevent corporate wrongdoing of which they had no knowledge. *United States v. Park*, 421 U.S. 658, 670-73 (1975).

It is no answer for the government to say that it has not imposed such liability here. Pet. Br. 27, No. 13-354. Widely shared moral beliefs hold those who control or manage corporations responsible for corporate wrongdoing. The government often shares those beliefs when enforcing the criminal law. There is nothing unusual about the Greens and the Hahns believing that they would be morally responsible for causing their corporations to pay for abortifacients. And it would be a shocking omission if their claims were wholly excluded from RFRA.

It is entirely consistent with our tradition of religious liberty to read RFRA as Congress wrote it, and as Congress understood it in the RLPA debates – as protecting all persons, including for-profit corporations and their owners, when the owners can show a substantial burden on their exercise of religion.

C. Excluding Religious Minorities from Businesses and Professions Is an Historic Means of Persecution That Must Be Covered by RFRA.

In eighteenth-century Ireland, it was generally illegal for a Catholic to keep more than two apprentices.[27] If your business grew to where you needed three apprentices, you were out of luck. Other laws imposed similar disabilities somewhat less directly. Anyone holding a civil or military office, or receiving pay by reason of a royal grant, or any school-master, barrister, solicitor, or notary, was required to take an anti-Catholic oath.[28] These and other examples were recent history to the Founders.

If you take seriously the belief that a new human life begins at conception, and if your business grows to the point where you need to incorporate it, the government says you are similarly out of luck in this country. Violate your faith, or sell your business. The exclusion is imposed one step less directly than the English anti-Catholic oaths; it is imposed by a law

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[27] An Act for explaining and amending An Act intituled, An Act to Prevent the further Growth of Popery, 8 Anne, c.3, §37 (1709), in 4 *Statutes at Large, Passed in the Parliaments Held in Ireland* 190, 214 (Dublin, George Grierson, 1786). There was an exception for "the hempen and flaxen manufacture."

[28] An Act for preventing Dangers which may happen from Popish Recusants, 25 Car. II, c.2, §2 (1673), in 5 *Statutes of the Realm* 782, 783 (Hein 1993); An Act for Enlarging the Time for taking the Oath of Abjuration, 1 Anne, stat. 2, c.21, §5 (1702), in 8 *id.* 218, 219.

that is claimed to be neutral and generally applicable. But that is no distinction; the very purpose of RFRA was to address substantial burdens on religious exercise imposed by neutral and generally applicable laws.

The Free Exercise Clause must be understood at least to address historically familiar means of religious persecution. And RFRA must be understood at least to address the same substantial burdens when imposed by neutral and generally applicable laws. The government's position is inconsistent with these premises. It says that once a business incorporates, the owners lose all religious-liberty rights with respect to that business. For the devout, the result may be that the owners are forced out of the business, or here, forced out of *any* business that grows to fifty employees and needs to incorporate. Fifty employees is a more generous limit than two apprentices, but the principle is the same. Limiting the size of business that can be owned by religious minorities is an historic wrong. Enforcing RFRA according to its universal language, as all understood it in the RLPA debates, will prevent the repetition of that historic wrong.

CONCLUSION

The Court should hold that for-profit corporations and their owners are protected by the Religious Freedom Restoration Act and its generally applicable

standards of exercise of religion, substantial burden, compelling interest, and least-restrictive means. The judgment in *Hobby Lobby* should be affirmed; the judgment in *Conestoga Wood* should be reversed.

Respectfully submitted,

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APPENDIX

DETAILED STATEMENTS OF INTEREST OF AMICI CURIAE

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly.

As a key member of the Coalition for Free Exercise of Religion, CLS was instrumental in passage of the Religious Freedom Restoration Act (RFRA) and the subsequent defense of RFRA's constitutionality and proper application in the courts. In the wake of *City of Boerne v. Flores,* 521 U.S. 507 (1997), CLS again played a leading role in a coalition formed to attain new religious freedom legislation, initially through the Religious Liberty Protection Act that passed the House of Representatives in 1999 and is a focus of this brief, and subsequently through the passage of the Religious Land Use and Institutionalized Persons Act. See, e.g., *Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 26-37 (1998) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society);

Religious Liberty Protection Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 at 151-59 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society); *Religious Liberty:* Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure 4-18 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

For two decades, RFRA has been the preeminent protection for Americans' religious freedom. Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. The HHS Mandate represents a serious attempt by the government to minimize Americans' religious liberty. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the HHS Mandate poses a grave threat to religious liberty and pluralism.

Headquartered in Manhattan, the 196-year-old **American Bible Society** exists to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. As one of the nation's oldest nonprofit organizations, American Bible Society partners with hundreds of individuals, organizations, and businesses to provide interactive,

high- and low-tech resources enabling first-time readers and seasoned theologians alike to engage with the best-selling book of all time. As advocates for the Bible, the Society and its partners are committed to operating their institutions consistent with their reading of the Bible, and to ensuring that the religious freedoms which entitle them to do so continue to be preserved for all.

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Global Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing 70 percent of active Anglicans globally – in April 2009. The ACNA is quickly growing, through efforts such as its "Anglican 1000" initiative, to rapidly catalyze the planting of Anglican congregations and communities of faith across North America. The ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human right to the free exercise of religion as given by God and embodied in the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993.

The **Association of Christian Schools International** (ACSI) is a nonprofit, non-denominational,

religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it by policies such as the HHS Mandate or other means.

The **Association of Gospel Rescue Missions** ("AGRM") was founded in 1913 and has grown to become North America's oldest and largest network of independent crisis shelters and recovery centers offering radical hospitality in the name of Jesus. Last year, AGRM-affiliated ministries served nearly 42 million meals, provided more than 15 million nights of lodging, bandaged the emotional wounds of thousands of abuse victims, and graduated over 18,000 individuals from addiction recovery programs. The ramification of their work positively influences surrounding communities in countless ways.

The first U.S. gospel rescue mission was founded in New York City in the 1870s and has continuously operated as a Christian ministry to the poor and addicted in the Bowery for 134 years. During that time, generations of men and women have followed their Christian "calling" to found gospel rescue missions and minister to the needs of the hungry, homeless, abused, and addicted in cities and small communities across America. This "calling" is inseparable from and an outward sign of their faith, as *James* 2:14-17 teaches:

> What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? If a brother or sister is poorly clothed and lacking in daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what good is that? So also faith by itself, if it does not have works, is dead.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over 14 million members worldwide. Headquartered in Salt Lake City, Utah, the Church conducts its temporal and spiritual affairs through a variety of corporate entities, including for-profit entities that advance its religious mission and message in vital ways. Religious liberty is a fundamental Church doctrine: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and

allow all men the same privilege, let them worship how, where, or what they may." *Article of Faith 11.*

Accordingly, in coalition with many other faith communities, the Church was significantly involved in drafting and advocating passage of the Religious Freedom Restoration Act. It was also involved, again with many others, in the effort to pass the Religious Liberty Protection Act and in the ultimate passage of the Religious Land Use and Institutionalized Persons Act. See, e.g., *Religious Liberty Protection Act of 1998:* Hearings Before the Senate Committee on the Judiciary on S. 2148 at 6-17 (1998) (testimony of Dallin Oaks, Member, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-day Saints); *Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 51-85 (1998) (testimony of Von Keetch, Counsel, The Church of Jesus Christ of Latter-day Saints); *Religious Liberty Protection Act:* Hearing on H.R. 1691 Before the Subcommittee on the Constitution of the House Committee on the Judiciary 22-54 (1999) (testimony of Von Keetch, Counsel, The Church of Jesus Christ of Latter-day Saints).

Based on direct experience in the passage of RFRA, the Church confirms that RFRA was intended to apply broadly, including to for-profit corporations. Such protections are vital to the Church and its religious mission.

The Ethics & Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The ERLC supported passage of the Religious Freedom Restoration Act and the Religious Liberty Protection Act, legislation that this brief discusses in detail. See, e.g., *Religious Liberty Protection Act of 1998:* Hearings Before the Senate Committee on the Judiciary on S. 2148 at 17-22 (1998) (testimony of Dr. Richard Land, President, Ethics & Religious Liberty Commission of the Southern Baptist Convention); *Religious Liberty Protection Act:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 at 6-10 (1999) (testimony of Dr. Richard Land, President, Ethics & Religious Liberty Commission of the Southern Baptist Convention).

Based on direct experience in the passage of RFRA, the ERLC confirms that RFRA was intended to apply broadly, including to for-profit corporations. Such protections are vital to our churches and their religious mission.

The Lutheran Church – Missouri Synod ("the LCMS") is a nonprofit corporation organized under the laws of the State of Missouri. It is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2,400,000 baptized members. The LCMS has a keen interest in protecting religious liberty generally, and in particular supporting the Free Exercise Clause of the First Amendment and full enforcement of the Religious Freedom Restoration Act.

Prison Fellowship Ministries is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Founded over 30 years ago by Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes, Prison Fellowship Ministries carries out its mission both in service to Jesus Christ and in contribution to restoring peace to our communities endangered by crime. As founder Chuck Colson explained, "God has given us a vision and a ministry to go to the last, the least, and the lost of our society and bring hope to them." *Foundations for Life: Prison Fellowship Annual Report 2004-2005.*

Religion has an unmistakable influence on prisoners' lives because it motivates them to make good choices that benefit themselves and our communities, bringing greater peace and security. Prison Fellowship Ministries is composed of three complementary divisions. First, the program arm of Prison Fellowship: (i) provides in-prison seminars and special events that expose prisoners to the Gospel, teach biblical values and their application, and develop leadership qualities and life skills; (ii) develops mentoring relationships that help prisoners mature through coaching and accountability; and (iii) supports released prisoners in a successful restoration to their families and society.

Justice Fellowship, the public policy and advocacy arm of Prison Fellowship Ministries, works to reform the criminal justice system based on biblical principles so communities are safer, victims are respected, and lives are restored. Finally, the Chuck Colson Center for Christian Worldview works to revive the Church and renew the culture by proclaiming truth, training Christian leaders, and catalyzing collaboration.

Prison Fellowship Ministries thus has a strong interest in the correct interpretation and application of laws such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Justice Fellowship supported RFRA's passage in Congress and proper interpretation in the courts. It also supported passage of RLUIPA and the predecessor legislation to RLUIPA, the Religious Liberty Protection Act, to

protect religious liberty at the state and local level. See, e.g., *Protecting Religious Freedom After Boerne v. Flores:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 3-9 (1997) (testimony of Charles Colson, President, Prison Fellowship Ministries).

World Vision, Inc. is a nonprofit Christian humanitarian organization that, for 64 years, has been dedicated to working with children, families and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. Motivated by their faith in Jesus Christ, World Vision's employees serve alongside the poor and oppressed as a demonstration of God's unconditional love for all people. World Vision serves all people, regardless of religion, race, ethnicity or gender. World Vision has a significant stake in this case as it may affect who can invoke the Religious Freedom Restoration Act and when, if at all, that Act protects religious conscientious objection.